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In The

Supreme Court of the United States

October Term, 1988

VAIL VILLAGE INN ASSOCIATES, a Colorado partnership, dba VILLAGE INN PLAZA; COWPERTHWAITE-VAIL, LTD., a Colorado limited partnership; JAMES COWPERTHWAITE; CHARLES H. COWPERTHWAITE; ROBERT E. BARRETT and G. RICHARD KATZENBACH,

Petitioners,

v.

MANUEL BENET GIRALT, aka MANUEL BENET,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

BRIEF IN OPPOSITION OF RESPONDENT MANUEL BENET GIRALT AKA MANUEL BENET

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QUESTIONS PRESENTED

1. Did the Colorado Court of Appeals err when it applied The Interstate Land Sales Full Disclosure Act, 15 U.S.C. 1701, *et seq.* (the "Act") in conformity with every other case interpreting the Act on the definition of "Lot", and in determining that petitioners' project did not fall within any of the exemptions provided in the Act?

2. Did the refusal of the trial judge to vacate an order of summary judgment entered against the petitioners premised upon their post-judgment naked allegation of a "possible" bias or prejudice violate any constitutional rights of the petitioners especially in light of the fact that the trial judge's ruling has twice been subject to appellate review?

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STATEMENT OF THE CASE

As his statement of the case, respondent incorporates the statement of the facts in the opinion below set forth at pages A-22 through A-48 in the Appendix filed by petitioners.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Petitioners Have Failed To Articulate Any Reason To Justify Invocation Of This Court's Discretionary Jurisdiction To Review A Ruling Consistent With All Other Case Law.

The Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1701, *et seq.* (the "Act") makes it unlawful for a real estate developer or agent " . . . directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails – (1) with respect to the sale or lease of any lot not exempt . . . unless a statement of record with respect to such lot is in effect . . . " and unless a property report with required disclosures has been furnished to the purchaser in advance of signing any contract. 15 U.S.C. § 1703(a).[1] The Act became law in 1968, and is loosely modeled on securities disclosure laws. Violation by the developer provides the purchaser with, among other remedies, a right to revoke any contract, 15 U.S.C. § 1703(c), and a right to receive back all money paid

[1] The version of the Act set forth in the Appendix filed by petitioners at pages A-51 through A-84 includes amendments made subsequent to the events giving rise to this action. Such amendments do not affect the substantive rights of the parties.

to the developer under the contract. 15 U.S.C. § 1703(e). Respondent timely exercised his recission right and became entitled to a return of his earnest money deposits totalling $185,000.00.

"Lot", while not statutorily defined, has been administratively defined since 1969 to include "any portion, piece, division, unit or undivided interest in land located in any state or foreign country if the interest includes the right to the exclusive use of a specific portion of the land." 24 C.F.R. § 1710.1.[2] The trial court and the Colorado Court of Appeals ruled that a condominium unit was a lot for purposes of application of the Act, a ruling consistent with every other state and federal court addressing the question. *Winter v. Hollingsworth Properties, Inc.*, 777 F.2d 1444 (11th Cir.1985); *Nargiz v. Henlopen Developers*, 380 A.2d 1361 (Del. 1977); *Appalachian, Inc. v. Olson*, 468 So.2d 266 (Fla. 2d DCA 1985); *Orpheus Investments v. Kyegon Investments*, 447 So.2d 257 (Fla. 3d DCA 1983); *Hamptons Development Corporation of Dade v. Sackler*, 522 So.2d 1035 (Fla. 3d DCA 1988); *N&C Properties v. Pritchard*, 525 So.2d 1346 (Ala. 1988), cert. den'd ___ U.S. ___, ___ L.Ed.2d ___, 109 S.Ct. 146 (1988); see also, Andrew J. Markus, Application of Interstate Land Sales Full Disclosure Act to Condominiums, *Real Property, Probate and Trust Journal*, Vol. 22, No. 1, p. 41 (1987). As in almost every other reported case involving the Act, its application was determined on a motion for summary

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[2] Petitioners do not contend that this regulation is unconstitutional or that its promulgation was beyond the power of the agency charged with administering the Act, the Secretary of Housing and Urban Development.

judgment. *Schatz v. Jockey Club Phase III, Ltd.*, 604 F.Supp. 537 (S.D. Fla. 1985); *Grove Towers, Inc. v. Lopez*, 467 So.2d 358 (Fla. 3d DCA 1985); *Dorchester Development, Inc. v. Burk*, 439 So.2d 1032 (Fla. 3d DCA 1983); *Finst Dev., Inc. v. Bemaor*, 449 So.2d 292 (Fla. 5 DCA 1984); *Winter, supra; Nargiz, supra.*

The Condominium Declaration (the "Declaration") filed and recorded with the Eagle County Clerk and Recorder by the petitioners stated that the project was divided into 141 condominiums, each of which carried *exclusive* rights to possession and ownership. Although in connection with a wholly separate claim for relief, respondent had alleged in his complaint that the parking units in the project were not merchantable because they were not statutory condominiums under Colorado law, petitioners consistently denied in the trial court and before the Colorado Court of Appeals that the parking units being marketed were anything other than statutory condominiums. Petitioners submitted no evidence by way of affidavit or otherwise which made such question a material issue. Only in petitioning the Colorado Supreme Court for discretionary review did petitioners for the first time state that the parking units were not condominiums. By the time they filed such petition in the Colorado Supreme Court, petitioners' interest as developer of the project had ended as a result of the voluntary bankruptcy petition filed by the petitioner-partnership. Petitioners' explanation why condominiumization of the parking units was attempted finds no support in the record and has never been addressed to any of the lower courts. Rather than arguing that the parking units were not condominiums, petitioners defended on the ground that

the project was exempt from the registration requirements imposed by the Act under one of four exemptions among the several statutory and administrative exemptions available. The four exemptions selected and relied upon by the petitioners were inconsistent with each other.

The Colorado Court of Appeals correctly ruled that whether the parking units were or were not condominiums was not essential to a resolution of this action. The question was whether those parking units were "lots" as administratively defined above. The parking units were marketed by petitioners and sold as condominium units; discrete interests for which at least one purchaser, the respondent, was to be charged an additional $15,000.00. There was no requirement that one own a residential or commercial unit within the project in order to purchase a parking unit. The Declaration provided that each owner of a parking unit would be entitled to the "exclusive ownership and possession of his Condominium." "Condominium", as defined by the petitioners in the Declaration which they drafted, and a copy of which they provided to respondent contemporaneously with his payment of the earnest money deposit, included parking units.

Application of uniformly interpreted law to these undisputed facts does not pose any significant change for real estate development. The Act has been law for over 20 years. Petitioners seemingly fail to understand that the Act does not apply to interests that are built and which therefor exist when marketed or to presales when the developer unconditionally guarantees completion within two years and gives the purchaser a right to specific performance. The Act does apply in circumstances where,

as here, the developer presells an interest in real property to be created in the future, takes the purchaser's earnest money and is not required to hold it in escrow or trust, makes no absolute promise about completion and contractually denies the purchaser any right to specific performance.

There is, after all, no real difference between the sale of undeveloped raw land to be improved in the future and the sale of condominiums which have yet to be constructed; both involve significant developer promises. Under these circumstances, the Act is very simple in its application. If the developer chooses not to comply with the disclosure requirements, the Act grants the purchaser a right to get his earnest money deposit back. The Act as written and uniformly interpreted grants the consumer only the protection which the developer in the first instant has chosen to deny.

II. Petitioners' Naked Allegations Of Bias Or Prejudice Against Them By A State Court Judge Are Not Sufficient Constitutionally To Require Disqualification.

Petitioners' argument that the Due Process Clause is triggered "whenever" the action of a state court judge in failing to recuse himself falls below the stated standard misapprehends the law. Rather, this Court has recognized that:

> it is normally within the power of the State to regulate procedures under which its laws are carried out . . . and its decision in this regard is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be

ranked as fundamental. *Patterson v. New York*, 432 U.S. 197, 201-202 (1977).

The principle of deference to the states and their administration of their own courts was amplified in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), where this Court held that "[c]ertainly only in the most extreme of cases would disqualification on [the basis of bias or prejudice] be constitutionally required." *Aetna, supra*, at 821. "[M]atters of kinship, personal bias, state policy, remoteness of interest, would seem to be matters merely of legislative discretion." *Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

When petitioners initially raised the issue of bias in a motion filed ten days before oral argument in the Colorado Court of Appeals,[3] that court remanded to the trial court with directions that it consider the allegations and apply the considerable body of Colorado law that has developed on the question of recusal. *Johnson v. District Court*, 674 P.2d 952 (Colo. 1984); *Zoline v. Telluride Lodge Association*, 732 P.2d 635 (Colo. 1987); *People v. Botham*, 629 P.2d 589 (Colo. 1981); *Litinsky v. Querard*, 683 P.2d 816 (Colo.App. 1984).

The petitioners' allegation is that in ruling on respondent's Motion for Summary Judgment the trial judge was

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[3] Petitioners have never asserted below that "retroactive" recusal was required by the Due Process Clause of the U.S. Constitution. Rather, they have relied upon state law which has developed on this question. On this basis alone, respondent questions the jurisdiction of this Court to review the rulings below.

prejudiced against the mother of two of the named parties, who also had a remote, unapparent limited partnership interest in one of the defendants. Not only was the mother's interest nowhere apparent in the record, her name appeared in no document before the court and she was not a named party. Petitioners do not assert that the trial judge had actual knowledge of the mother's interest in the partnership; only that he should have gone outside of the record and himself independently searched the real property records for the whole of the county in which the project was located.[4]

Not only was this argument unanimously rejected by the Colorado Court of Appeals, no member of the Colorado Supreme Court voted to review this determination. Under these circumstances there can be no real contention of even the appearance of impropriety.

It must be remembered that the action of the trial court under review was the propriety of its ruling on respondent's Motion for Summary Judgment. The trial court was called upon only to apply the law to the material facts which the parties admitted were not in dispute. Indeed, almost all of the facts were established by documents drafted by the petitioners. The trial court was in no position to exercise bias or prejudice as it was not required to find or determine any genuine, disputed issue of material fact. Rather, the trial court applied uniformly interpreted law which no reviewing court has found to be other than correct and proper.

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[4] Petitioners have not stated why the U.S. Constitution limits the required search only to one county.

Finally, petitioners argue that this matter should be reviewed because of the confidential nature of Colorado's judicial disciplinary system. Petitioners do not contend that the system is constitutionally infirm and did not address the sufficiency of the system in the lower courts. A party may not preserve a constitutional challenge by generally invoking the Constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon. *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. ___, 100 L.Ed.2d 62, 108 S.Ct. 1645 (1988).

CONCLUSION

For these reasons, respondent Manuel Benet Giralt aka Manuel Benet respectfully prays that petitioners' Petition for Writ of Certiorari be denied.

Dated this 21 day of December, 1988.

Respectfully submitted,

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